# 83 - 1653



No. ____

IN THE

## Supreme Court of the United States

OCTOBER TERM, 1983

---

SCRIPPS-HOWARD BROADCASTING COMPANY,
*Petitioner,*

v.

EMBERS SUPPER CLUB, INC.,
*Respondent.*

---

# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

---

BRUCE W. SANFORD
*Counsel of Record*
LEE LEVINE
BRIAN S. HARVEY
BAKER & HOSTETLER
818 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 861-1500
*Counsel for Petitioner*

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

## QUESTION PRESENTED FOR REVIEW

Whether the Constitution requires that the plaintiff in a defamation action establish each element of a *prima facie* case of defamation in order to surmount a defendant's motion for directed verdict at the close of the plaintiff's case-in-chief.*

*The majority of the shares of petitioner Scripps-Howard Broadcasting Company is owned by the E. W. Scripps Company, a privately held corporation. Scripps-Howard Broadcasting Company has an approximate 50-percent participation in four partnerships, Cablevision of Connecticut, Ann Arbor Cablevision, Cablevision Systems of Southern Connecticut, and Cablevision of Sacramento.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Table of Authorities Continued**

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

---

No. ___

---

SCRIPPS-HOWARD BROADCASTING COMPANY,
*Petitioner,*

v.

EMBERS SUPPER CLUB, INC.,
*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

---

Petitioner, Scripps-Howard Broadcasting Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in this proceeding on January 11, 1984.

### OPINIONS BELOW

The ruling of the Court of Common Pleas for Hamilton County, Ohio is unpublished and is included in the Appendix hereto. The opinion of the Court of Appeals for Hamilton County, Ohio is unpublished and is included in the Appendix hereto. The opinion of the Ohio Supreme Court is published at 9 Ohio St. 3d 22 and at 457 N.E.2d 1164 and is included in the Appendix hereto.

### JURISDICTION

The judgment of the Ohio Supreme Court, reversing the directed verdict for petitioner and remanding for trial, was entered on January 11, 1984. This petition for certiorari is filed

within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

1. First Amendment, United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

2. Fourteenth Amendment, Section 1, United States Constitution:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . .

## STATEMENT OF THE CASE

### A. Preliminary Statement

In July 1972, petitioner Scripps-Howard Broadcasting Company, d/b/a Station WCPO-TV ("the Station"), broadcast two news reports stating that police had raided a local lounge and seized gambling paraphernalia, including betting slips and racing forms. Despite nine years of pretrial litigation and a full opportunity to present evidence at trial, there has been no showing that these news reports are false or defamatory of any person or entity, including the plaintiff in this action—Embers Supper Club, Inc. ("Embers"). Nor has Embers made any showing that the Station's news reports were prepared negligently or that Embers suffered any injury as a result of their broadcast. Accordingly, after Embers rested at trial, the court granted a directed verdict for the Station, which was unanimously affirmed on intermediate appeal.

Four of the seven justices of the Ohio Supreme Court, however, chose to ignore these fundamental evidentiary failures and reversed the grant of a directed verdict to the Station. In the majority's haste to create a syllabus for defamation actions brought by private individuals in Ohio, it concocted a case that does not exist. Because the resulting decision rests upon a misapplication of elementary principles of the constitutional law of defamation, the Station prays that its petition for cer-

tiorari be granted. Indeed, the Ohio Supreme Court's cavalier disregard for the trial record, and for the dispositive grounds upon which both lower courts had premised their rulings, warrants summary reversal of the decision below, pursuant to S. Ct. R. 23.1.[1]

**B. Procedural History**

On July 21, 1972, police raided a lounge owned and operated by Embers and seized gambling paraphernalia. Record, *Embers Supper Club, Inc.* v. *Scripps-Howard Broadcasting Co.*, No. 83-102, at 594 (Ohio Jan. 11, 1984) [hereinafter cited as R.]. On August 17, 1972, Embers, the sole plaintiff, filed this defamation action against the Station in the Court of Common Pleas for Hamilton County, Ohio, based on the Station's news reports about the raid. On October 10, 1979, the trial court denied the Station's third and final motion for summary judgment. Appendix to Petition for Certiorari at 26a [hereinafter cited as App.]. The court ruled: "there are disputed issues of fact concerning the issues of negligence and of damages which cannot be resolved on a motion for summary judgment." App. 27a.

On June 15, 1981, the case came on for trial before a jury. After four days of evidence, Embers rested. R. 575. The Station moved to strike Embers' evidence as to damages on the ground that it was too speculative. App. 20a. The trial court granted the motion. App. 22a. The Station then moved for a directed verdict on the grounds, *inter alia*, that:

> (a) Embers had failed to demonstrate that the news reports at issue are defamatory of Embers;
>
> (b) Embers had failed to demonstrate that the news reports are false;

---

[1] Simultaneously with the filing of this petition, the Station is requesting the clerk of the court possessed of the Record to certify the Record and provide for its transmission to this Court, pursuant to S. Ct. R. 19.1.

(c) Embers had failed to demonstrate that the Station was negligent or otherwise at fault in broadcasting the reports; and

(d) Embers had failed to demonstrate that it suffered any actual injury as a proximate result of their broadcast.

App. 23a. The trial court granted the motion for directed verdict, on the ground that Embers had failed to establish "the requisite elements" of defamation, including damages. App. 16a.[2]

Embers appealed to the Court of Appeals for Hamilton County, Ohio. A unanimous panel of the court of appeals affirmed, ruling that Embers had failed to establish "a prima facie case of actionable defamation." App. 11a. The court of appeals held that the news reports at issue are "substantially accurate" and that they were published "without fault" of any kind by the Station. App. 13a, 15a. The court of appeals applied a standard of "due care" and concluded: "[T]he actual testimony received at trial substantiated the truth of the publication, so . . . it is not easy to determine how additional efforts at verification (even if such be deemed a requirement of due care) would have altered the tenor of the publication." App. 15a.[3]

---

[2] In granting the directed verdict, the trial court applied Ohio R. Civ. P. 50(A)(4), which states:

> When a motion for directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

The trial court afforded the Station no special procedural protections emanating from the First Amendment, but rather determined on traditional bases that Embers, as plaintiff, had failed to establish a *prima facie* case of defamation. *See* Calder v. Jones, 52 U.S.L.W. 4349 (U.S. Mar. 20, 1984) (No. 82-1401).

[3] The court of appeals declined to address the Station's contention that since it had merely reported unlawful activity at Embers' place of business, without stating that Embers, its employees or principals encouraged, ac-

In a 4-3 decision, the Ohio Supreme Court reversed the directed verdict, based on its finding that Embers is not a "public figure" and need not demonstrate "actual malice" in order to recover. App. 3a.[4] In so doing, the majority disingenuously sidestepped the uncomfortable reality that neith-

---

quiesced in, or even knew of the unlawful activity, the news reports at issue are not defamatory of Embers. App. 13a. The court of appeals also ruled that the news reports are privileged under Ohio law. *Id.*

[4] Ohio law is fashioned by the syllabus of an Ohio Supreme Court decision. Beck v. Ohio, 379 U.S. 89, 93 n.2 (1964); Cassidy v. Glossip, 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967). The syllabus in this case establishes a rule of law, already widely adopted in other jurisdictions, that "[i]n cases involving defamation of private persons, where a prima facie showing of defamation is made by the plaintiff, the question which a jury must determine by a preponderance of evidence is whether the defendant acted reasonably in attempting to discover the truth or falsity or defamatory character of the publication." App. 1a.

The Ohio Supreme Court's decision disingenuously implies that the lower courts had applied the "actual malice" standard articulated in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971). There is, however, no question that the trial court and court of appeals expressly declined to apply the "actual malice" standard. Indeed, the trial court denied the Station's summary judgment motions on the precise ground that factual disputes existed on the "negligence" issue. App. 27a.

Further, the Ohio Supreme Court majority completely ignores the principal grounds raised by the Station in that court for affirmance—that news reports of wrongdoing at a place of business are not defamatory of the owner of the business absent a charge that the owner participated or acquiesced in the wrongful conduct; that the news reports at issue are substantially true; that there had been no showing that the Station was in any sense at fault; and that Embers had failed to prove that it had sustained "actual injury" as a result of the news reports.

The Ohio Supreme Court's haste to disregard the facts of the instant case so that it could be used as a vehicle to announce its adoption of the negligence standard is revealed starkly by the fact that it accepted the case for review even though Embers' notice of appeal was filed 31 days too late to secure review of the court of appeals decision, under the Ohio Supreme Court's own rules. *See* Ohio S. Ct. R. I, § 1(A). Although the Station filed a motion to dismiss the petition for review in the Ohio Supreme Court on this ground and raised the issue in its brief in that court, the Ohio Supreme Court majority utterly ignored this issue in its opinion as well.

er the trial court nor the court of appeals had held that Embers is a public figure. Indeed, both courts had held that the case was to be adjudicated under a negligence standard. App. 15a, 27a.

To reach its decision, the Ohio Supreme Court wholly ignored the actual bases for the directed verdict that had been granted below. Faced with a record that makes unmistakably clear that both lower courts had already treated Embers as a private figure and had correctly applied a negligence standard, the court simply discarded the trial record and assumed the existence of a defamatory falsehood for which there is neither plausibility nor evidentiary support. Similarly, the majority failed to address the absence of any suggestion in either news report at issue that Embers, or any other identified person or entity, had engaged in or had even known of any misconduct. Instead, the majority disregarded entirely the uncontroverted evidence adduced in Embers' case-in-chief that both news reports are substantially true and, in fact, presumed their falsity. The majority further overlooked the absence in the record of any evidence that Embers had suffered actual injury as a result of the news reports at issue, or that the Station had been at fault in any sense. In short, the Ohio Supreme Court found error where there had been none, simply to fashion a rule of law for Ohio that had already been applied correctly by both lower courts.

Joining in an opinion by Justice Holmes, three of the seven justices dissented "for a number of reasons." App. 6a. The dissenters concluded that the news reports at issue are not "defamatory as to this plaintiff," since "a report . . . of illegal activity at a place of business is not a libel against the owner of the business, unless the owner itself is charged with initiating, encouraging or acquiescing in the misconduct." App. 6a-7a. In addition, the three dissenters declared that the news reports at issue are "basically true," and that "if the evidence does not substantiate the falseness of the publication, the plaintiff cannot prevail." App. 7a. Finally, the dissenters found a complete "absence in the record of anything from which reasonable

minds could have concluded fault on the part of the defendant" under a negligence standard. App. 8a.

### C. How Federal Question Is Presented

The federal constitutional requirement that a defamation plaintiff must establish a *prima facie* case in order to surmount a motion for directed verdict was presented to the trial court upon the Station's making of such motion. App. 26a. In urging affirmance of the trial court's grant of the motion, the Station continued to advance this federal constitutional requirement in the court of appeals and in the Ohio Supreme Court.

### D. Statement Of Facts

Embers, an Ohio corporation, is the sole plaintiff in this action. At the time of the broadcasts at issue in July 1972, Embers owned and operated a cocktail lounge and, purportedly, a restaurant at a shopping center in Springdale, Ohio. R. 244. The so-called "lounge," which had been doing business since 1968 as the Embers Supper Club ("Club"),[5] had only recently begun to serve food. R. 502-06. Receipts from food sales were meager at best.[6]

At the four-day trial, Embers called only four witnesses: James F. Lumanick ("Lumanick"), who wrote the script of the first of the two news reports at issue, R. 36-99; Albert J. Schottelkotte ("Schottelkotte"), the Station's news anchorman

---

[5] For purposes of this petition, "Embers" refers to the plaintiff corporation "Embers Supper Club, Inc."; "Club" refers to the lounge and restaurant owned and operated by the corporation at the time of the news reports at issue.

[6] On July 1, 1972, for instance, the Club grossed $6.25 in food sales. R. 503. On July 6, 1972, the Club grossed 95 cents from food sales. R. 504. Numerous other days saw exceedingly thin food sales: July 10, $14.51; July 14, $18.35; July 18, $1.10; July 20, the day prior to the police raid, $7.35. R. 504-05. Overall, food sales at the Club were insignificant, averaging less than $22.57 per business day. R. 506. Liquor sales averaged an unimpressive $168.49 daily during this period. R. 507.

and director of news and special events, R. 100-33; Jon Hughes, an assistant professor of English at the University of Cincinnati, R. 134-241; and Daniel S. Comer ("Comer"), Embers' sole shareholder, R. 241-557. Embers also introduced in evidence official police records concerning the raid. R. 587, 592-94. The facts presented by Embers at trial may be summarized as follows:

**The Embers Supper Club**

All of Embers' stock is owned by Comer. R. 251. At all relevant times, Comer participated in virtually all aspects of business at the Club, a bar where horses and gambling appeared to be the preoccupation of both the owner and the so-called "cook." R. 257-60. Indeed, Comer was heavily involved in horse racing and gambling. He at times owned as many as 50 race horses, R. 399, and he entered them in races in at least nine states, R. 390. Comer routinely gambled on his horses, as he testified, "[w]henever I thought they would win." R. 288. He admitted to placing bets with "bookies" who were operating illegally "unless," as he stated at trial, "I won and they didn't pay." R. 400.

At the Club, Comer maintained a complete, up-to-date "library" of horse racing periodicals and materials useful for gambling on races. R. 295. He would have bets placed by the "cook" at the Club, John Watts ("Watts"), R. 395, who was also known by aliases such as "Wilcas John" and "Wilcas Watts," R. 381. Comer would discuss horses with Watts at the Club and, as Comer testified, "he and I from time to time sat down with a betting form and talked about races" at the Club. R. 387. Watts himself made use of the materials in the Club's "library." *Id.*[7] After the raid, criminal charges of illegal gambling were brought against Watts; the charges ultimately were dismissed before trial. R. 302, 310.

---

[7] Although Watts was designated as the "cook" and, according to Comer, worked in this capacity full-time at a salary of $100 to $150 per week, the Club's food sales were sparse. *See* note 6 *supra*.

From its inception, Embers had failed to earn a profit. Embers experienced losses every year from 1970 through 1973. R. 492-94, 542-43, 547. There was no evidence admitted at trial that Embers had suffered any business loss as a result of the news reports at issue.

**The Raid At The Club**

In July 1972, a customer advised Comer that she had heard from three men that if they could not collect on certain bets placed with the "bookie at the Embers," they would "blow the place up." R. 373-75, 592. According to police records, Comer told the woman that "he knew of the bookmaking activities" at his Club. R. 592. The woman then notified the Springdale, Ohio Police Department.

Some time earlier, Sergeant Jefferson B. Hermann of the Springdale Police Department had been at the Club where, according to Sergeant Hermann, he saw "what appeared to be wagering sheets." R. 592.[8] Shortly thereafter, Sergeant Hermann swore to an Affidavit for Search Warrant, which was filed in the Hamilton County, Ohio Municipal Court. *Id.* In the Affidavit, Sergeant Hermann described the woman's report of gambling debts, the "bookie" and threatened violence at the Club, as well as his own observations of illegal gambling paraphernalia at the Club. *Id.* Pursuant to this Affidavit, on Friday, July 21, 1972, the Hamilton County Municipal Court issued a warrant to search the Club for "apparatus, books, sheets or other devices or paraphernalia for recording wagers." R. 593.

Pursuant to the warrant, the Springdale Police Department raided and searched the Club at 4:15 p.m. on July 21, 1972. R. 594. The raid was conducted during the Club's busiest period—the Friday evening cocktail hour—by four uniformed police

[8] Due to the trial court's decision granting the Station's motion for directed verdict, the Station did not put on any evidence at trial, and Sergeant Hermann did not testify. However, Embers itself introduced affidavits and sworn statements by the Sergeant. R. 587, 592-94.

officers. R. 284, 371-72, 587. The officers blocked all of the entrances to the Club for the duration of the raid, which lasted an hour and a half. R. 285-86, 371. Police refused to allow customers to depart, and a number of individuals were locked in the Club, against their will, for over an hour. R. 371-79. Several people who attempted to patronize the Club during the cocktail hour were turned away. *Id.*

On July 21, 1972, Sergeant Hermann made an official report of that day's raid in the daily log book of the Springdale Police Department:

> 4:15 P.M. With a search warrant issued by Judge Paul George went to the Embers Supper Club, 332 Northland Blvd. and search[ed] the building for betting slips for horse races. Numerous forms and betting slips were removed from the premises and will be turned over to the Hamilton County Pros. office and the State Liquor Board. JH RP RK BW

R. 487.[9] According to the official Return on Search Warrant filed in the Hamilton County Municipal Court, Sergeant Hermann and his officers seized 17 Daily Racing Forms; a notebook entitled "The Handy Pocket Calculator for Two and Three Horse Parlays and Memo Book"; eleven Kentucky Sports Bulletins; and "6 sheets of papers w/numbers and combinations & bet slips." R. 299, 594.

**The News Reports At Issue**

On Friday, July 21, 1972, the night of the raid, the Station reported the police action on its 11:00 p.m. newscast. The script of the July 21 news report reads, in its entirety:

> Springdale Police raided the Embers Supp[er] Club, on Northland Boulevard, this afternoon, and seized racing

[9] Sergeant Hermann subsequently executed an affidavit in which he explained that "the word 'forms' in [the] entry [in the police log book] designates and means racing forms which were removed from the premises together with betting slips for horse races and other gambling paraphernalia." R. 587. Sergeant Hermann also made clear that the entry is "an official record entry of the city of Springdale police department and is an official public record of said city." *Id.*

> forms, betting slips, and other gambling paraphrenalia [sic]. Police said they acted on a tip, that handbook operators from Elmwood Place h[ad] set up operation there. So far, no arre[sts] have been made; the Club itself remains open.

R. 578.

Two days later, on July 23, 1972, the Station broadcast its regular Sunday night recapitulation of the week's news on its 11:00 p.m. newscast. R. 56, 123. That Sunday's news program reviewed three separate incidents involving police action and gambling activities: the arrest of two "bookies" in incidents unrelated to the Club and the raid of the Club. The complete script of the July 23 news report reads:

> Business went sour for some of the area's bookies . . . in Elmwood police seized one man doing business on foot, another operating out of a restaurant on Vine Street. And, in Springdale, the Embers Club was raided, and police seized bettings [sic] slips and equipment.

R. 580.

Nowhere did either of the two news reports suggest that Embers or its sole shareholder Comer had participated in, or even known of, gambling activites. Indeed, the reports did not indicate that *any* named person or entity had engaged in wrongful conduct.

At trial, Lumanick described how the Station regularly prepared news reports such as these, which are based on police action. R. 77-84. As a matter of established procedure, a Station employee monitored police radio broadcasts. R. 76-77. When that employee heard of police action, such as an arrest or raid, he telephoned the appropriate law enforcement agency for verification and additional information. R. 77-80. He then furnished the information he compiled to a writer, such as Lumanick, who drafted a script. R. 78-79. Finally, the news report was given to Schottelkotte. R. 79. If Schottelkotte, in his editorial judgment, approved the report, he would read it on the nightly news program he had anchored for more than 20 years.

Lumanick testified that he must have written the July 21 news report, since he recognized the style as his own. R. 41. Schottlekotte drafted the script of the July 23 recapitulation. R. 123. The information concerning the Club in the July 23 report was based on the July 21 report and, in turn, official police information. R. 123-24. Embers presented no evidence that either news report was prepared in derogation of the customary procedures employed by news personnel at the Station or by other professional broadcast journalists. Embers did not call the Station employee who gathered the information contained in the July 21 news report or police personnel to testify.

At trial, therefore, the accuracy of the news reports was wholly uncontroverted when Embers rested upon completion of its case-in-chief. It was undisputed that police and Comer *both* were informed that if the "bookie at the Embers" did not pay his debts, three men would "blow the place up." R. 373-75, 592. Similarly, it was uncontroverted that police *did* raid the Club on July 21, 1972, and that police *did* seize "racing forms," "betting slips," and "other gambling paraphernalia"—all as reported in the broadcasts. R. 284-305, 587.

Indeed, Embers alleged that the news reports are false in only a trivial and ultimately frivolous respect. Embers asserted that the July 21 news report is false in stating that "police said they acted on a tip, that handbook operators from Elmwood Place had set up operations there." According to Embers, this statement implies that it was no more than a front for organized crime. However, prior to resting its case at trial, Embers produced no evidence whatever to demonstrate that the news report's reference to "handbook operators from Elmwood Place" is false in any sense. *No* police personnel were called by Embers to testify that such a statement had not been made to the Station. *No* testimony was elicited that police did not act on such a tip. Indeed, Embers introduced *no* evidence

that Elmwood Place gamblers had not been operating at the Club.[10]

## REASONS FOR GRANTING THE WRIT

### The Ohio Supreme Court's Decision Unconstitutionally Fails To Require The Plaintiff To Prove A *Prima Facie* Case Of Defamation.

This Court's decisions make clear that the First and Fourteenth Amendments forbid the imposition of defamation liability unless the *plaintiff* establishes at trial each element of its defamation claim, including falsity, a defamatory reference to the plaintiff, fault, and actual injury to reputation as a proximate result of the defamation. As a matter of federal constitutional law, a court no longer may indulge in presumptions adverse to the defendant with respect to these elements at the close of the defamation plaintiff's evidence at trial.

In the instant case, the decision of the Ohio Supreme Court ignores the "constitutional command of the First Amendment" set forth in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). In *Gertz*, this Court held that, because of the First Amendment values at stake in libel actions, "state remedies for defamatory falsehood" must "reach no farther than is necessary to protect the legitimate [state] interest involved." *Id.* The Court in *Gertz* delineated the *only* state interest that warrants the imposition of defamation liability: "the compensation of individuals for harm inflicted on them by *defamatory falsehood*." *Id.* at 341 (emphasis added).

Absent a *prima facie* showing by the plaintiff that it is entitled to recovery, permitting a defamation action to with-

---

[10] The only remaining claim of falsity made by Embers was its assertion that the July 23 report states that "Embers is an area bookie." However, the July 23 report nowhere contains such a statement. Indeed, the July 23 news report, which describes two arrests of unidentified "bookies" as well as the raid at the Club, is incapable of being understood as referring to the Club as a "bookie."

stand a motion for directed verdict renders meaningless the First Amendment guarantees articulated in *Gertz*. By presuming falsity, fault, and injury, and by authorizing recovery for statements that clearly are not defamatory of the plaintiff, the Ohio Supreme Court in the instant case has opened the way for a gratuitous award of money damages. Such an award can only punish the Station for accurately informing the public about law enforcement activities without advancing any legitimate state interest in providing remedies for the publication of defamatory falsehood. Such legitimate state interests are implicated only when the plaintiff demonstrates, *prima facie*, that:

(a) the statement complained of is defamatory of the plaintiff;

(b) the statement is not substantially true;

(c) the defendant was at fault with regard to the truth or falsity of the statement; and

(d) the plaintiff suffered actual injury to reputation as a proximate result of the statement.

Because the judgment below implicates the freedom of the press at the core of the First Amendment, a reviewing court is obliged to "make an independent examination of the whole record," *Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963), in order to assure itself "that the judgment does not constitute a forbidden intrusion on the field of free expression," *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964). An independent review of the record in the instant case reveals that the judgment of the Ohio Supreme Court cannot stand.

**1. To Survive A Motion For Directed Verdict, The Plaintiff Must Demonstrate, *Prima Facie*, That The Statement Complained Of Is Defamatory Of The Plaintiff.**

It is fundamental that no plaintiff is entitled to any remedy for defamation unless a defamatory statement has been published about him. In *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 288 (1964), this Court's review of the record revealed that

the evidence was "constitutionally defective" because it was "incapable of supporting the jury's finding that the allegedly libelous statements were made 'of and concerning' respondent." The *Restatement (Second) of Torts* sets forth the fundamental requirement that no recovery can be had unless the statement is defamatory of the plaintiff.[11] As the framers of the *Restatement* correctly recognized:

> The question of whether the communication was made of and concerning the plaintiff has been held by the Supreme Court to be one involving constitutional rights. As such, it is subject to appellate review on up to the Supreme Court.

3 Restatement (Second) of Torts § 564, comment g (1977); *accord, id.* § 580A, comment g; *see Barger* v. *Playboy Enterprises, Inc.*, 564 F. Supp. 1151, 1152-53 (N.D. Cal. 1983); *Edgartown Police Patrolmen's Association* v. *Johnson*, 522 F. Supp. 1149 (D. Mass. 1981); *Ratner* v. *Young*, 465 F. Supp. 386, 394 (D.V.I. 1979).

In the instant case, the news reports at issue scrupulously avoid any defamatory reference to Embers. Nowhere do the reports even suggest that Embers, its employees or principals encouraged, participated in—or were even aware of—gambling activities, much less gambling under the auspices of organized crime. The reports merely state that the Club was the *scene* of a police raid and of gambling activities.

Without exception, courts have held that a report of illegal activity at a place of business does not constitute a libel against the owner of the business, unless the owner itself is charged with encouraging or acquiescing in the misconduct. In *El Meson Espanol* v. *NYM Corp.*, 521 F.2d 737 (2d Cir. 1975), for instance, a magazine contained an article stating that the restaurant owned and operated by the plaintiff was a "good place[]

---

[11] A defamatory communication is made concerning the person to whom its recipient correctly, or mistakenly but reasonably, understands that it was intended to refer.

3 Restatement (Second) of Torts § 564 (1977).

to meet a connection" to buy cocaine. *Id.* at 738. The court found "nothing in the article charging that the plaintiff conducts his [restaurant] improperly, or that he is responsible for the character of his guests." *Id.* at 740 (quoting *Kennedy* v. *Press Publishing Co.*, 41 Hun. 422, 422-23 (N.Y. 1886)). Accordingly, the court held that the owner of the restaurant stated no cause of action for defamation.

Similarly, in *Gwinn* v. *Washington Post Co.*, 211 F.2d 641 (D.C. Cir. 1954) (per curiam), the owners of a restaurant brought an action for defamation based on a report that police officers and federal agents arrested five persons at the restaurant. Because the report "fairly read, contain[ed] nothing defamatory of the [restaurant owners] or of their business," the court granted summary judgment for the newspaper. *Id.* at 641. And in *Hatjioannou* v. *Tribune Co.*, 8 Media L. Rep. (BNA) 2637 (Fla. Cir. 1982), a newspaper identified the "Stable Lounge," a bar owned by the plaintiff, as a "trouble spot" requiring frequent visits from law enforcement officers. *Id.* at 2637. Since the articles in question "did not accuse the Stable Lounge of encouraging criminal conduct," the court dismissed the plaintiff's defamation action. *Id.* at 2638. The court declared:

> The portrayal of a business establishment as the *scene* of disturbances or crime is not libelous.

*Id.* (emphasis in original).[12]

---

[12] *Accord*, Hamilton's Clubhouse, Inc. v. United Press Int'l, Inc., 9 Media L. Rep. (BNA) 2453 (D. Iowa 1983) (corporate owner of nightclub not libeled by report of arrest at club); Fairyland Amusement Co. v. Metromedia, Inc., 413 F. Supp. 1290 (W.D. Mo. 1976) (report of high incidence of rape in and around amusement park not defamatory of corporate owners of park); Cooper v. Miami Herald Publishing Co., 159 Fla. 296, 31 So. 2d 382 (1947) (news report that murder occurred in plaintiff's restaurant held not defamatory of plaintiff); Schnable v. Meredith, 378 Pa. 609, 107 A.2d 860 (1954) (no cause of action based on article about gambling and reporting police seizure of slot machines on plaintiff's property); Richwine v. Pittsburgh Courier Publishing Co., 186 Pa. Super. 644, 142 A.2d 416 (1958) (no cause of action based on report that amusement park owned by corporate plaintiff was scene of orgy); Maglio v. New York Herald Co., 93 A.D. 546, 87 N.Y.S. 927 (1904) (no cause of action based on report that hotel kept by plaintiff harbored murderer).

These cases make clear that no state interest is served by allowing gratuitous recovery where, as here, nothing defamatory has been said about the owner of a business reported merely to be the scene of improper activity. The Ohio Supreme Court, in its zeal to adopt "the negligence standard," simply ignored this dispositive issue and wholly disregarded the constitutional mandate that these news reports, to be actionable, must be defamatory of the plaintiff—a ground upon which the trial court had granted the directed verdict at issue.

**2. To Survive A Motion For Directed Verdict, The Plaintiff Must Demonstrate, *Prima Facie*, That The Allegedly Defamatory Statement Is Not Substantially True.**

The decision below is fundamentally at odds with the First Amendment mandate that the publication of truth is not actionable in defamation. *See, e.g., New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). Despite findings of substantial truth by both courts below it, and Embers' failure to submit any evidence of falsity during its case-in-chief, the Ohio Supreme Court indulged in the presumption of falsity forbidden by the First Amendment. In order to reverse the directed verdict that had been granted at the close of Embers' evidence, the Court accepted as proven fact the bald allegations of falsity made in Embers' Complaint, which were nowhere supported by evidence introduced at trial. As a review of the record amply reveals, Embers failed to satisfy its constitutional obligation to present evidence of falsity as part of its case-in-chief.

The record is completely devoid of evidence to contradict the accuracy of either news report. Indeed, as the dissent below correctly concluded, "the actual testimony received at trial substantiated the truth of the publication." App. 7a. It was uncontroverted at trial that the raid described in the news reports occurred and that police seized gambling equipment at the Club. Despite ample opportunity to do so, Embers adduced

*no* evidence that police did not inform the Station that the raid was based on a tip that handbook operators from Elmwood Place were present at the Club. On the contrary, the evidence was clear that Embers maintained a "library" of materials for betting on races and that police learned the Club would be "blown up" if the "bookie at the Embers" did not pay his gambling debts. Embers easily could have called police personnel to testify that the police had *not* acted on a tip concerning handbook operators from Elmwood Place. Presumably, having had nearly a decade to prepare its case for trial, Embers investigated this matter and concluded it would better serve its interests not to call police personnel to testify on its behalf at trial. Thus, the only basis upon which the Ohio Supreme Court could reverse the findings of both lower courts on the issue of substantial truth was to presume falsity and thereby excuse Embers' failure to introduce evidence of falsity at trial.[13]

This Court has repeatedly explained that "defamatory falsehood" is unworthy of First Amendment protection only because "there is no constitutional value in *false* statements of fact." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (emphasis added). Accordingly, as early as *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271 (1964), the Court made clear

---

[13] It is precisely at the close of the defamation plaintiff's case-in-chief at trial—and the motion of the defendant for a directed verdict—that the constitutional strictures against strict liability, presumed falsity, and presumed damages come into play. At this stage of the case, only if the plaintiff—having now had a full opportunity to do so at trial—has come forth with evidence that each element of its cause of action is *prima facie* satisfied can its defamation claim survive a motion for a directed verdict. Thus, a greater quantum of proof is necessary in a defamation case to surmount a directed verdict motion than is needed to overcome a motion to dismiss or for summary judgment. *See* 9 C. Wright & A. Miller, Federal Practice and Procedure § 2532 (1971). Indeed, the same quantum of evidence can require that a motion for summary judgment be denied because of a "genuine issue as to [a] material fact" and that a motion for directed verdict be granted because "reasonable minds could come to but one conclusion upon the evidence." Ohio R. Civ. P. 50(A)(4), 56(C).

that "[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth . . . and especially one that puts the burden of proving truth on the speaker." Specifically, the Court in *New York Times* recognized that "[a]llowance of the defense of truth, with the burden of proving it on the defendant does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars." *Id.* at 279. Because of the constitutional difficulties inherent in any liability rule that presumes that an allegedly defamatory statement is false, this Court in *New York Times* concluded that such a presumption "dampens the vigor and limits the variety of public debate. *It is inconsistent with the First and Fourteenth Amendments.*" *Id.* (emphasis added).

Subsequent decisions have confirmed that the common law rule of presumed falsity is inconsistent with constitutional principles. In *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (emphasis added), the Court explained that even with respect to so-called "private" plaintiffs, "a rule of strict liability that compels a publisher or broadcaster to guarantee the *accuracy* of his factual assertions may lead to intolerable self-censorship." Accordingly, the Court in *Gertz* held that strict liability is constitutionally impermissible precisely because "[a]llowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties." *Id.*

Thus, the Ohio Supreme Court's decision to reverse the directed verdict granted by the trial court, in the face of Embers' failure to submit any evidence of falsity at trial, impermissibly transgresses the constitutional requirement that only the publication of defamatory falsehood is actionable in a libel suit. The decision, which simply assumes that a showing of falsity is not necessary, unconstitutionally permits liability to be imposed for the publication of truth.

### 3. To Survive A Motion For Directed Verdict, The Plaintiff Must Demonstrate, *Prima Facie*, That It Suffered Actual Injury To Reputation As A Proximate Result Of The Allegedly Defamatory Statement.

In *Gertz*, this Court declared that the "countervailing state interest" in affording remedies for defamatory falsehood "extends no further than compensation for actual injury." 418 U.S. at 349. Common law doctrines of presumed damages, like those of presumed falsity and strict liability, unnecessarily "exacerbate[] the danger of media self-censorship." *Id.* at 350. The Court in *Gertz* explained that the "largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms." *Id.* at 349. Specifically, the Court concluded that "the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained." *Id.* Moreover, the Court declared that there is no substantial state interest in "securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." *Id.* This "constitutional command of the First Amendment" requires, in each case, that any "award[] must be supported by competent evidence concerning the injury." *Id.* at 349-50. In addition, compensation in defamation actions is constitutionally permissible only for "injury sustained *by* the publication." *Id.* at 349 (emphasis added). Thus, a plaintiff must also demonstrate that his damages were proximately caused by the alleged defamation. *Littlefield* v. *Fort Dodge Messenger*, 614 F.2d 581 (8th Cir.), *cert. denied*, 445 U.S. 945 (1980).

A review of the record demonstrates that the Ohio Supreme Court has cleared the way for an improper award of presumed damages in this case.[14] There is no evidence that Embers ever

---

[14] Corporate defamation plaintiffs, such as Embers, are incapable of experiencing such types of actual injury as personal humiliation, embarrassment, mental anguish or suffering. Golden North Airways, Inc. v. Tanana Publishing Co., 218 F.2d 612 (9th Cir. 1954).

earned a profit, before or after the news reports at issue were broadcast. In fact, Embers suffered losses every year from 1970 through 1973. R. 492-94, 542, 543, 547. Comer claimed that after the raid and news reports business "declined drastically," R. 335, but actually the days following the news reports were among the month's busiest, R. 506. Nowhere could Comer support his speculations as to losses with documents or records. He stated, for instance, that his stock in the corporation was worth $150,000 prior to the raid and $40,000 afterwards. R. 356-57, 514-17, 546. However, there was *no* evidence whatever as to the value of any of Embers' assets, the amount of its paid-in capital, shareholder equity, or liabilities. Similarly, Comer testified that Embers had a "break-even point" of $6,500 to $7,000 per month, R. 472, 553-54, and that in August 1982 the corporation grossed only $4,321, R. 334-35. Yet he furnished no documentation of any of Embers' actual monthly expenses for any period.

Moreover, the Ohio Supreme Court has authorized recovery by Embers even though the record is devoid of evidence that Embers' injuries, if any, were proximately caused by the news reports at issue. At trial, Embers failed to demonstrate that its alleged damages were caused by the Station, rather than by the police raid itself. Indeed, the uncontroverted evidence demonstrates that the Club's regular customers learned of the raid as first-hand participants, when they were locked out of the busy Friday cocktail hour or were forced to remain inside the Club for the entire hour-and-a-half raid. R. 286, 371-72, 379.

In the view of the Ohio Supreme Court, actual injury was proven merely because Embers' "chief executive officer testified concerning the business loss of plaintiff." App. 6a. In fact, however, Comer did no more than surmise that his own stock in the corporation was worth less after the raid and news reports than before them. At the close of Embers' case, the trial court excluded this testimony as too speculative to be placed before the jury. By permitting this wholly unsupported assertion to pass for evidence of actual injury, the Ohio Supreme Court has

made a mockery of the First Amendment's command that defamation awards be rooted in harm suffered. By requiring the defendant to demonstrate the absence of actual injury where the plaintiff itself has shown none, the Ohio Supreme Court has reinstated the doctrine of presumed damages. This approach is inconsistent with the plain teaching of *Gertz*.

**4. To Survive A Motion For Directed Verdict, The Plaintiff Must Demonstrate, *Prima Facie*, That The Defendant Was At Fault In Publishing The Allegedly Defamatory Statement.**

The decisions of this Court recognize that strict liability for defamation produces "intolerable self-censorship." *Gertz*, 418 U.S. at 340. Accordingly, the Court held in *Gertz* that defamation liability is precluded absent a demonstration, even by a "private" plaintiff, that the defendant was at fault with regard to the truth or falsity of the publication at issue.

In reversing the directed verdict granted by the trial court, the Ohio Supreme Court assumed that Embers had demonstrated a *prima facie* case under the negligence standard, despite the undisputed evidence that the Station had accurately reported information provided by police officials.[15] This assumption is wholly at odds with the prohibition of strict liability articulated in *Gertz*.

At trial, Embers produced no evidence whatever that the Station was negligent with respect to the broadcast of either news report at issue. Lumanick explained how the Station

---

[15] It had long been settled in Ohio that reports of oral statements of police are privileged, even when the statements do not appear in police documents. Torski v. Mansfield J. Co., 100 Ohio App. 538, 137 N.E.2d 679 (1965). Indeed, *Torski* had emerged as a nationally recognized authority for the rule that "an immaterial mistake . . . does not make defendant liable." W. Prosser, Handbook of the Law of Torts 832 n.60 (4th ed. 1971) (citing *Torski*). The Ohio Supreme Court ignored the well established precedent in *Torski* as well in reversing the decisions of the trial court and court of appeals.

prepared news reports describing police action. R. 77-83. It was undisputed at trial that when the Station learned of police action, such as an arrest or raid, it did not simply broadcast a news report, relying solely upon the police radio. Instead, the Station telephoned the police department to obtain verification and additional facts. *Id.*

Embers offered no evidence of deviation from this procedure in the instant case. If either news report contained information which had *not* been furnished by the police, it was incumbent upon Embers as plaintiff so to demonstrate. Embers readily could have called police personnel to testify, if they could, to facts contrary to the report's assertion that its contents were provided by the police. Alternatively, through discovery, Embers could have sought the name of the Station employee who compiled and verified the information reported about the Club. Although it had over nine years to prepare for trial, Embers undertook neither of these efforts. As a matter of federal constitutional law, the risk of Embers' failure to produce evidence concerning the Station's handling of these matters must be borne by Embers.

Embers purports to find evidence of negligence in the fact that none of its employees were contacted by the Station prior to the broadcasts. This assertion flies in the face of *Gertz*' plain holding that a state cannot, in the guise of applying a fault-based standard, "purport[] to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential." 418 U.S. at 348. The news reports at issue contain *no* defamatory potential whatever, for they scrupulously refrain from accusing Embers, or any of its employees or principals, of any participation in or knowledge of gambling activities. There was simply no need to contact a representative of Embers, since the news reports at issue accuse it of nothing. Indeed, as the court of appeals correctly held, "the actual testimony received at trial substantiated the truth of the publication, so . . . it is not easy to determine how additional efforts at verification

(even if such be deemed a requirement of due care) would have altered the tenor of the publication." App. 15a.

A defamation plaintiff's inability to come forth at trial with evidence of fault must result in a directed verdict for the defendant. With the full arsenal of discovery tools readily available in libel litigation, *see Herbert* v. *Lando*, 441 U.S. 153 (1979), a defamation plaintiff must itself suffer the risks of evidentiary failures at the trial stage. Permitting a case to go to the jury where the evidence of fault is nonexistent would reinstate the discredited rule of strict liability. Indeed, a court should be especially wary of the forbidden inference that, merely because a defamatory falsehood was published, the publisher must have been negligent or otherwise at fault. It is the plaintiff's obligation to produce *evidence* of fault. As the Utah Supreme Court explained in *Seegmiller* v. *KSL, Inc.*, 626 P.2d 968, 976 (Utah 1981):

> [T]he important interests to be protected, which are founded in the First Amendment, require that juries not be allowed to conclude that because a false, defamatory statement was published, negligence must therefore have occurred. *Res ipsa loquitur* must be employed with great care. We concur with Comment g to § 580B of the Restatement (Second) of Torts . . .:
>
> . . . .
>
> 'the court should be cautious in permitting the doctrine of res ipsa loquitur to take the case to the jury and permit the jury, on the basis of its own lay inferences, to decide that the defendant must have been negligent because it published a false and defamatory communication. This could produce a form of strict liability de facto and thus circumvent the constitutional requirement of fault.'

*Id.* (quoting 3 Restatement (Second) of Torts § 580B, comment g (1977)).

## CONCLUSION

In view of the Ohio Supreme Court's failure to require a defamation plaintiff to establish a *prima facie* case in order to

overcome a motion for directed verdict, the Station respectfully requests that its petition be granted and the decision below be summarily reversed in accordance with S. Ct. R. 23.1.

Respectfully submitted,

BRUCE W. SANFORD
*Counsel of Record*

LEE LEVINE
BRIAN S. HARVEY
BAKER & HOSTETLER
818 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 861-1500
*Counsel for Petitioner*

# APPENDICES

# APPENDIX A

[The Supreme Court of the State of Ohio]

EMBERS SUPPER CLUB, INC.,

*Appellant,*

v.

SCRIPPS-HOWARD BROADCASTING CO.,

*Appellee.*

---

[Cite as Embers Supper Club, Inc. v. Scripps-Howard Broadcasting Co. (1984), 9 Ohio St. 3d 22.]

*Defamation—Corporate plaintiff not a public figure or public official—Ordinary negligence standard adopted.*

O.Jur 3d Defamation §§ 42, 80.

In cases involving defamation of private persons, where a prima facie showing of defamation is made by the plaintiff, the question which a jury must determine by a preponderance of evidence is whether the defendant acted reasonably in attempting to discover the truth or falsity or defamatory character of the publication.

(No. 83-102—Decided January 11, 1984.)

Appeal from the Court of Appeals for Hamilton County.

## STATEMENT OF THE CASE

Plaintiff-appellant, Embers Supper Club, Inc., commenced an action for damages against defendant-appellee, Scripps-Howard Broadcasting Co. (WCPO-TV), for two separate broadcasts aired on WCPO-TV. The first broadcast on July 21, 1972, stated:

"Springdale police raided the Embers Supper Club, on Northland Boulevard, this afternoon, and seized racing forms, betting slips, and other gambling paraphernalia. Police said they acted on a tip, that handbook operators from Elmwood Place had set up operation there. So far, no arrests have been made; the club itself remains open."

Two days later, on July 23, in a televised review of the week's news program, the same subject was covered concerning the plaintiff in this language:

"Business went sour for some of the area's bookies * * * in Elmwood police seized one man doing business on foot, another operating out of a restaurant on Vine Street. And, in Springdale the Embers Club was raided, and police seized betting slips and equipment."

These broadcasts stem from a police raid of the Embers Supper Club based upon a valid search warrant. As indicated by the return on the search warrant the police seized seventeen Daily Racing Forms; a booklet entitled "The Handy Pocket Calculator for Two and Three Horse Parlays and Memo Book," eleven Kentucky Sports Bulletins and six sheets of paper with numbers and combination and betting slips.

Albert J. Schottelkotte, director of news and special events for WCPO-TV, admitted that "gambling in Elmwood Place had been linked to organized crime." The official police report of the Embers raid made no mention of the word "bookies" and no reference to Elmwood Place. The Embers Supper Club was located in the suburb of Springdale, not Elmwood Place. Schottelkotte admitted that the thrust of the news publication was that "handbook operators in Elmwood Place, one or more of them, as an entity, that they had set up operations in the Embers." Plaintiff's expert witness, Jon C. Hughes, an assistant professor in journalism, testified that the July 21, 1972 publication attributed to the Springdale police as a statement of fact that "handbook operators from Elmwood Place had set up operations" at the Embers.

The two broadcasts were therefore false in linking the Embers Supper Club with gambling in Elmwood Place and its organized crime connections.

Plaintiff's chief executive officer and sole shareholder, Daniel S. Comer, testified there was no gambling activity conducted at the Embers, and that no one from WCPO-TV

ever contacted him concerning the truth or falsity of the facts contained in the two broadcasts. The seizure by the police of gambling material at the Embers caused a citation for a gambling offense to be issued several days later against an Embers cook named John Watts. The seized gambling materials were presented at the Watts trial. That case was dismissed. No one else affiliated with the Embers was charged with any gambling activity.

At the close of plaintiff's evidence, the trial court granted a directed verdict for the defendant. The court of appeals affirmed.

## OPINION

The cause is now before this court upon the allowance of a motion to certify the record.

*Strauss, Troy & Ruehlmann Co., L.P.A., Mr. Charles G. Atkins* and *Mr. William R. Jacobs*, for appellant.

*Messrs. Wood, Lamping, Slutz & Reckman, Mr. Harry M. Hoffheimer, Messrs. Baker & Hostetler, Mr. Bruce W. Sanford, Mr. Lee Levine* and *Mr. Brian S. Harvey*, for appellee.

CLIFFORD F. BROWN, J. The directed verdict for defendant requires determining the standard or rule for imposing liability upon a defendant which publishes false statements concerning a plaintiff who is not a public official or public figure. Since plaintiff is not a public official or public figure, the holdings in *New York Times Co.* v. *Sullivan* (1964), 376 U.S. 254, and *Curtis Publishing Co.* v. *Butts* (1967), 388 U.S. 130, requiring proof of actual malice by defendant are inapplicable.

In *New York Times Co.* v. *Sullivan*, the United States Supreme Court held that a "public official" could not maintain a suit for defamation without showing by clear and convincing evidence that the publisher acted with actual malice. In *Curtis Publishing Co.* v. *Butts*, the court extended the actual malice standard to "public figures." This standard was further expanded in 1971 when the Supreme Court decided the case of

*Rosenbloom* v. *Metromedia, Inc.* (1971), 403 U.S. 29. In *Rosenbloom*, the court, in a plurality opinion, extended the actual malice standard to private individuals where the matter reported was of concern to the public.

Applying the *Rosenbloom* standard, the directed verdict granted defendant would have been appropriate since there was an absence of showing of actual malice on the part of WCPO-TV in its news reports. However, the United States Supreme Court in 1974, retreated from its extension of the *Sullivan* standard to private individuals. The case which expressed this move was *Gertz* v. *Robert Welch, Inc.* (1974), 418 U.S. 323. In *Gertz*, the necessity of proving actual malice in defamation suits by private individuals against media defendants was struck down. The court found that the individual states should be permitted to set the standard of proof in cases where an allegedly defamatory statement is published by a media defendant concerning a private individual. The only limitation on this was that a state would not be permitted to impose "liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Gertz* v. *Robert Welch, Inc.*, at 347.

This court has not enunciated a standard of review for defamation actions involving private individuals and the media. A majority of other jurisdictions when faced with this responsibility have set an ordinary negligence standard which must be shown by a preponderance of the evidence. See *Peagler* v. *Phoenix Newspapers, Inc.* (1977), 114 Ariz. 309, 560 P. 2d 1216; *Dodrill* v. *Arkansas Democrat Co.* (1979), 265 Ark. 628, 590 S.W. 2d 840, certiorari denied (1980), 444 U.S. 1076.[1]

---

[1] *Phillips* v. *Evening Star Newspaper* (C.A.D.C. 1980), 424 A. 2d 78, certiorari denied (1981), 451 U.S. 989; *Karp* v. *Miami Herald Publishing Co.* (Fla. App. 1978), 359 So. 2d 580, appeal dismissed (1978), 365 So. 2d 712; *Cahill* v. *Hawaiian Paradise Park Corp.* (1975), 56 Hawaii 522, 543 P. 2d 1356; *Troman* v. *Wood* (1976), 62 Ill. 2d 184, 340 N.E. 2d 292; *McCall* v. *Courier-Journal & Louisville Times* (Ky. 1981), 623 S.W. 2d 882; *Gobin* v.

We are persuaded that the negligence standard of review is appropriate in this area. In cases involving defamation of private persons, where a prima facie showing of defamation is made by the plaintiff, the question which a jury must determine by a preponderance of evidence is whether the defendant acted reasonably in attempting to discover the truth or falsity or defamatory character of the publication. See, *e.g.*, *Peagler* v. *Phoenix Newspapers, Inc.*, *supra*, at 315; *Thomas H. Maloney & Sons, Inc.* v. *E. W. Scripps Co.* (1974), 43 Ohio App. 2d 105 [72 O.O.2d 313].

This standard is applicable to the factual stance in this case. It was error to direct a verdict for the defendant. We reverse.

Defendant further contends it is not liable as a matter of law, and that a directed verdict for defendant was proper, because defendant was privileged to publish government information without incurring liability by reason of R.C. 2317.05 which in pertinent part reads:

"The publication of a fair and impartial report of * * * the issuing of any warrant, * * * or the filing of any * * * other document in any criminal or civil cause in any court of competent jurisdiction, or of a fair and impartial report of the contents thereof, is privileged * * *." This contention is without merit because the publication in this case was not mere reporting of the information included in a warrant or other document but included references to bookmaking operations and Elmwood Place which were not a part of official records.

---

*Globe Publishing Co.* (1975), 216 Kan. 223, 531 P. 2d 76; *Stone* v. *Essex County Newspapers, Inc.* (1975), 367 Mass. 849, 330 N.E. 2d 161; *Jacron Sales Co.* v. *Sindorf* (1976), 276 Md. 580, 350 A. 2d 688; *Madison* v. *Yunker* (1978), 180 Mont. 54, 589 P. 2d 126; *McCusker* v. *Valley News* (1981), 121 N.H. 258, 428 A. 2d 493; *Marchiondo* v. *Brown* (1982), 98 N.M. 394, 649 P. 2d 462; *Martin* v. *Griffin Television, Inc.* (Okla. 1976), 549 P. 2d 85; *DeCarvalho* v. *DaSilva* (R.I. 1980), 414 A. 2d 806; *Memphis Publishing Co.* v. *Nichols* (Tenn. 1978), 569 S.W. 2d 412; *Foster* v. *Laredo Newspapers, Inc.* (Tex. 1976), 541 S.W. 2d 809, certiorari denied (1977), 429 U.S. 1123; *Seegmiller* v. *KSL, Inc.* (Utah 1981), 626 P. 2d 968; and *Taskett* v. *King Broadcasting Co.* (1976), 86 Wash. 2d 439, 546 P. 2d 81.

Since defendant's publication was not within the protections of R.C. 2317.05 it does not escape the rule imposing liability because of the common-law privilege defined in Restatement of the Law, Torts 2d (1977) 297, Section 611:

"The publication of defamatory matter * * * in a report of an official action or proceeding * * * is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported."

Defendant also contends the directed verdict was proper because plaintiff failed to prove actual injury or damages. This contention is without merit. Plaintiff's chief executive officer testified concerning the business loss of plaintiff resulting from the defamatory publication, thus creating an issue of general and special damages to plaintiff. A corporate plaintiff has a right to recover for its economic injury. *Golden North Airways* v. *Tanana Publishing Co.* (C.A. 9, 1954), 218 F. 2d 612, 624.

For these reasons the judgment of the court of appeals is reversed, and the cause is remanded to the court of common pleas for a new trial.

*Judgment reversed*
*and cause remanded.*

CELEBREZZE, C. J., SWEENEY and J. P. CELEBREZZE, JJ., concur.

W. BROWN, LOCHER and HOLMES, JJ., dissent.

HOLMES, J., dissenting. I must dissent for a number of reasons. At the outset, I seriously question whether the words and phrases utilized by the defendant in its news reports were defamatory as to this plaintiff. The publications, it would seem to me, did not assert the commission of an offense by the plaintiff corporation but, rather, that a raid was conducted on the premises, and that certain gambling paraphernalia and equipment had been seized. The law generally applied in this regard is that a report or commentary of illegal activity at a

place of business is not a libel against the owner of the business, unless the owner itself is charged with initiating, encouraging or acquiescing in the misconduct. See *El Meson Espanol* v. *NYM Corp.* (C.A. 2, 1975), 521 F. 2d 737, and *Gwinn* v. *Washington Post Co.* (C.A.D.C. 1954), 211 F. 2d 641.

Secondly, I believe that the trial court and the court of appeals were correct in concluding that the complained of reports were basically true. There is ample case law and legal commentary to the effect that in a defamation action the plaintiff has the burden of proving that the publication was not true, and if the evidence does not substantiate the falseness of the publication, the plaintiff cannot prevail. *Wilson* v. *Scripps-Howard Broadcasting Co.* (C.A. 6, 1981), 642 F. 2d 371, certiorari dismissed (1981), 454 U.S. 1130; *Cox Broadcasting Corp.* v. *Cohn* (1975), 420 U.S. 469; Restatement of the Law, Torts 2d (1977), Section 580B, Comment j. Additionally, Ohio has provided by statutory enactment, in R.C. 2739.02, that:

"In an action for a libel or a slander, the defendant may allege and prove the truth of the matter charged as defamatory. Proof of the truth thereof shall be a complete defense. * * *"

Here, the evidence revealed that the newscasts were substantiated by testimony adduced during the plaintiff's case that the police raid resulted in the seizure of the Daily Racing Form; the Kentucky Sports bulletin; a trade publication of entries and scratches at racetracks; a "Handy Pocket Calculator for Two and Three Horse Parlays and Memo Book"; and a sheet of cardboard with handwritten figures on it, as well as numerous papers with entries thereon. I can see no substantial deviation from the truth in a publication which asserts the police seizure of " * * * racing forms, betting slips, and other gambling paraphernalia * * * " or " * * * betting slips and equipment * * *," in view of what had actually been confiscated. In that truth is a complete defense in a defamation action alleging libel or slander, this case upon the facts could reasonably have been directed out on such issue.

Even if the above considerations are not deemed dispositive, the existence of the privilege accorded by R.C. 2317.05 provides protection to the defendant in this case. Here, the publications are a substantially accurate rephrasing of the information contained in the official police report and, since the record is absent any evidence of malice on the part of defendant, one must conclude that the publications were privileged.

Finally, I note the absence in the record of anything from which reasonable minds could have concluded fault on the part of defendant. While plaintiff argues that there was an inadequate verification by defendant of the facts of the case, and accordingly acted negligently—upon the evidence adduced, I cannot agree. The actual testimony received at trial substantiated the truth of the publication, so that it is difficult to understand how additional efforts at verification would have altered the tenor of the publication.

Based upon all of the evidence presented to the jury, the trial court did not abuse its discretion in directing a verdict for Scripps-Howard. Therefore, I would affirm the court of appeals.

W. BROWN and LOCHER, JJ., concur in the foregoing dissenting opinion.

# APPENDIX B

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

---

NO. C-810708

---

EMBERS SUPPER CLUB, INC.,
*Plaintiff-Appellant,*

v.

SCRIPPS-HOWARD BROADCASTING COMPANY,
*Defendant-Appellee.*

---

OPINION

FILED
COURT OF APPEALS

OCT 20, 1982
CLERK OF COURTS

APPEAL FROM THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Messrs. Strauss, Troy, & Ruehlmann Co., L.P.A., Charles G. Atkins and William R. Jacobs, of counsel, 2100 Central Trust Center, Cincinnati, Ohio 45202, for Plaintiff-Appellant,

Messrs. Wood, Lamping, Slutz & Reckman, Harry M. Hoffheimer, of counsel, 900 Tri-State Building, Cincinnati, Ohio 45202, for Defendant-Appellee.

PALMER, J.

I

On July 2, 1972, officers of the Springdale, Ohio, police force entered the Embers Supper Club on a warrant to search for

horse racing betting slips. Racing forms, betting slips, and other paraphernalia were in fact found.[1]

On the same day as the raid, the following statement was broadcast in a news program over television station WCPO-TV, owned and operated by the defendant-appellee:

> Springdale Police raided the Embers Supper Club, on Northland Boulevard, this afternoon, and seized racing forms, betting slips, and other gambling paraphernalia. Police said they acted on a tip, that handbook operators from Elmwood Place, had set up operations there. So far no arrests have been made; the Club itself remains open.

Two days later, in a televised review of the week's news programs, a second reference to the Embers Supper Club was broadcast.

> Business went sour for some of the area's bookies . . . in Elmwood police seized one man doing business on foot, another operating out of a restaurant on Vine Street. And, in Springdale, the Embers Club was raided, and police seized betting slips and equipment.

These two broadcast references were the predicates for the plaintiff-appellant's action against the defendant-appellee for defamation. Following preliminaries, including the filing of several amended complaints, trial commenced but was interrupted by the granting of a motion for a directed verdict at the conclusion of the appellant's case. This appeal was timely filed therefrom.

In his first assignment of error plaintiff-appellant contends that the trial court erred to his prejudice by directing a verdict in favor of the defendant-appellee at the close of plaintiff-

---

[1] The following entry concerning the raid was made by the Springdale Police Department in its daily log book:

> 4:15 P.M. With a search warrant issued by Judge Paul George went to the Embers Supper Club, 332 Northland Blvd. and search the building for betting slips for horse races. Numerous forms and betting slips were removed from the premises and will be turned over to Hamilton County Pros. office and the State Liquor Board. JH RP RK BW

appellant's evidence. The basic question for this Court is whether plaintiff-appellant made a prima facie case of actionable defamation. Viewing the evidence most strongly in favor of the party against whom the motion is directed, as Civ. R. 50 requires, we hold that reasonable minds could only have concluded against the plaintiff on the determinative issues, and that the Court of Common Pleas correctly directed a verdict and entered judgment for the defendant. *See Hawkins* v. *Ivy* (1977), 50 Ohio St. 2d 114, 363 N.E.2d 367.

It is of some importance to note, preliminarily, the import of recent decisions of the United States Supreme Court on the law of libel and slander in this jurisdiction. Beginning with the decision in *New York Times Co.* v. *Sullivan* (1964), 376 U.S. 254, 84 S. Ct. 710, a series of cases examined the traditional rules of libel and slander as they comported themselves with current views of First Amendment and other constitutional rights and guarantees. Considering first the nature of malice required to bottom an action of libel brought by a public official, *N.Y. Times Co.* v. *Sullivan*, *supra*, and then by a public figure, *Curtis Publishing Co.* v. *Butts* and *The Associated Press* v. *Walker* (1967), 388 U.S. 130, 87 S. Ct. 1975, the Supreme Court passed to a consideration of libel actions brought by private individuals meeting neither definition of a public official or public figure. In *Gertz* v. *Robert Welch, Inc.* (1974), 418 U.S. 323, 94 S. Ct. 2997, the Court declined to apply the "actual malice" requirement of *N.Y. Times Co.* v. *Sullivan* to actions by private figures, but, in effect, eliminated the distinction between libel *per se* and libel *per quod*, in which the former obviated the need for proof of general damages by conclusively presuming them from the nature of the published words. The Court held that, so long as they do not

> impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.

*Id.*, 418 U.S. at 347, 94 S. Ct. at 3010.

Fault having been established, said the Court, recovery may be had for actual injury, but *punitive* damages may not be recovered unless, in addition to fault, there is a determination of knowledge of falsity or reckless disregard for the truth.

Applying these standards to Ohio law, the case of *Thomas H. Maloney & Sons, Inc.* v. *E. W. Scripps Co.* (8th Dist. 1974), 43 Ohio App. 2d 105, 334 N.E.2d 494, *cert. denied*, 423 U.S. 883, 96 S. Ct. 151 (1975), offered the following restatements of the present laws of libel in this jurisdiction:

> We, therefore, hold that a private individual bringing a libel suit based upon a publication which is defamatory on its face must prove not only the publication of such statement but also actual injury, and fault on the part of the publisher. Such fault may consist of either negligent failure to exercise due care, or a greater degree of fault such as express or actual malice.

*Id.* at 110; 334 N.E.2d at 498. The concurring opinion of Judge Krenzler stated the rule in this fashion:

> This (*i.e. Gertz*) means that a plaintiff must allege and prove by a preponderance of the evidence a false and libelous writing, negligence by the defendant, and damages. If a plaintiff wishes to recover special damages he must allege and prove them. If a plaintiff in a libel action wants to recover punitive damages he must allege and prove that the defendant had knowledge of the falsity or that he showed a reckless disregard for the truth.

*Id.* at 117; 334 N.E.2d at 502.

Bearing the above principles in mind, we must then proceed to examine the evidence brought forward by the appellant in pursuit of his claim of defamation to ascertain whether reasonable minds could disagree as to the determinative issues of: (i) whether the publications were false and defamatory; (ii) whether they were nevertheless privileged; (iii) whether they were uttered in fault, *i.e.*, negligently, or in express or actual malice; and (iv) whether they resulted in actual injury.

## II

Appellee questions with some vigor whether the words could have been construed as defamatory in the first instance. Thus, he argues that the publication does not assert the commission of a criminal offense by the appellant corporation, but rather that a raid was conducted and that gambling paraphernalia and equipment were seized on plaintiff's premises, neither assertion necessarily involving the appellant entity in a criminal offense. Alternately, appellee argues that even if an offense was charged to appellant in the publication, it did not charge an *indictable* offense, *i.e.*, a felony, citing *Hollingsworth* v. *Shaw* (1869), 19 Ohio St. 430, and *Davis* v. *Baron* (1875), 27 Ohio St. 326.

While the defamatory character of the publication is indeed a threshhold issue, the point is here unnecessary to decide since other deficiencies in the appellant's case are clearly dispositive of the appeal. Thus, where we must conclude, as we do, that the publication was true, was in any event privileged, and was published without fault by the appellee, it is unnecessary to go further.[2] Here, the evidence revealed that the publication was substantiated by testimony adduced during the appellant's case that the police raid on the appellant resulted in the seizure of the Daily Racing Form, the Kentucky Sports Bulletin, a trade publication of entries and scratches at racetracks, a "Handy Pocket Calculator for Two and Three Horse Parlays and Memo Book," and a sheet of cardboard with handwritten figures on it, as well as numerous slips of paper with entries thereon. T.p. 293-303. We can see no substantial deviation from the truth in a publication which asserts the police seizure of ". . . racing forms, betting slips, and other gambling paraphernalia . . ." or ". . . betting slips and equipment . . ." predi-

---

[2] Additional issues raised by the appellee in defense of the trial court's action, *e.g.*, alleged deficiencies in proof of actual damages, and constitutional privileges of the appellee corporation arising under the First Amendment, are thus redundant to a decision herein, and are not further discussed or decided.

cated on the foregoing. Since truth is a complete defense to an action in libel or slander, R.C. 2739.02, the matter might well have ended at this point and upon this issue.

But even if this consideration is not deemed dispositive, the existence of the privilege accorded by R.C. 2317.04 and .05[3] seems to us to extend protection to the appellee in this case. Our conclusion in this respect follows the decision in *Torski* v. *Mansfield Journal Co.* (5th Dist. 1956), 100 Ohio App. 538, 137 N.E.2d 679, where the protection of the above statutes was extended to a newspaper report based on information furnished to a reporter by the desk man at a police station and from a police report. While the publication transposed the age of the rape victim from 24 years to 12 years, the *Torski* court nevertheless held the publication privileged:

> A newspaper account of judicial proceedings is privileged where such account is fair, impartial, and substantially

---

[3] R.C. 2317.04 provides:

> The publication of a fair and impartial report of the proceedings before state or municipal legislative bodies, or before state or municipal executive bodies, boards, or officers, or the whole or a fair synopsis of any bill, ordinance, report, resolution, bulletin, notice, petition, or other document presented, filed, or issued in any proceeding before such legislative or executive body, board, or officer, shall be privileged, unless it is proved that such publication was made maliciously.

R.C. 2317.05 provides:

> The publication of a fair and impartial report of the return of any indictment, the issuing of any warrant, the arrest of any person accused of crime, or the filing of any affidavit, pleading, or other document in any criminal or civil cause in any court of competent jurisdiction, or of a fair and impartial report of the contents thereof, is privileged, unless it is proved that the same was published maliciously, or that defendant has refused or neglected to publish in the same manner in which the publication complained of appeared, a reasonable written explanation or contradiction thereof by plaintiff, or that the publisher has refused, upon request of the plaintiff, to publish the subsequent determination of such suit or action. This section and section 2317.04 of the Revised Code do not authorize the publication of blasphemous or indecent matter.

> accurate, even though it may contain matter otherwise libelous.

*Id.* at 545, 137 N.E.2d at 683. Here, the publications complained of seem to us substantially accurate rephrasing of the information contained in the official police report, and, since the record is absent any evidence of malice on the part of appellee, one must conclude that the publications were privileged.

Finally, we note the absence in the record of anything from which reasonable minds could have concluded fault on the part of appellee. Certainly there was no evidence of malice, express or actual, and while appellant emphasizes what it feels was an inadequate verification by the appellant of the facts of the case—a consideration said to constitute a want of due care and therefore negligence—we do not so read the record. As we remarked earlier, the actual testimony received at trial substantiated the truth of the publication, so that it is not easy to determine how additional efforts at verification (even if such be deemed a requirement of due care) would have altered the tenor of the publication.

The first assignment of error, directed to the alleged error of the trial court in directing a verdict at the conclusion of the plaintiff's case, is accordingly overruled.

The second assignment of error, directed to the alleged error of the trial court in sustaining objections to appellant's testimony in support of damages, is overruled, as subsumed in our determination with respect to the first assignment of error. Even had the court permitted the evidence rejected or stricken as to the appellant's damages, the trial would have had to have been concluded upon the motion for a directed verdict upon the other determinative issues discussed above. No possible prejudice could therefore have attended the trial court's resolution of the damages issue.

The judgment is affirmed.

SHANNON, P. J., and BLACK, J., CONCUR.

# APPENDIX C

IN THE COURT OF COMMON PLEAS,
HAMILTON COUNTY, OHIO

---

## CASE NO. A-726032

## JUDGMENT ENTRY

---

EMBERS SUPPER CLUB, INC.,

*Plaintiff,*

v.

SCRIPPS-HOWARD BROADCASTING CO.,

*Defendant.*

---

ENTERED JUL 30, 1981

This cause came on to be heard upon the merits and the jury was selected and sworn.

Plaintiff proceeded with the presentation of its evidence and at the close of Plaintiff's case, Defendant moved that the matter be arrested from further consideration by the jury and a verdict be granted for defendant.

Upon a careful consideration of the evidence, the arguments and the law, the Court determined said motion to be well taken and granted the same for the following reasons:

1. For failure of Plaintiff to establish by a preponderance of all of the evidence the requisite elements of the offense of slander; and,

2. For failure of Plaintiff to establish by a preponderance of the evidence, Plaintiff's claim for damages. The jury at this point could only have speculated as to the damages and the proximate cause of such damages. It is the Scotch verdict "Not Proved."

Therefore the cause is arrested from further consideration by the jury and a verdict directed for Defendant.

Costs in this case are taxed to the Plaintiff.

Exceptions are saved to the parties as their interests are adversely affected.

Enter this 30th day of July, 1981.

PAUL E. RILEY, Judge
by assignment

ROBERT G. BURKHART
Trial Counsel for Defendant

CHARLES G. ATKINS
Trial Counsel for Plaintiff

# APPENDIX D

## THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

---

EMBERS SUPPER CLUB, INC.,

*Appellant,*

vs.

SCRIPPS-HOWARD BROADCASTING CO.,

*Appellee.*

---

1984 TERM

To wit: January 11, 1984

---

**No. 83-102**

---

## APPEAL FROM THE COURT OF APPEALS

---

for HAMILTON County

---

This cause, here on appeal from the Court of Appeals for HAMILTON County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed for the reasons stated in the opinion filed herein and cause remanded to the trial court for proceedings consistent with the opinion rendered herein.

It is ordered and adjudged also that appellant recover from appellee its costs expended in this Court; that a mandate be sent to the COURT OF COMMON PLEAS to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for HAMILTON County for entry.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal
of the Court
this 4 day of April 1984
James Wm. Kelly, Clerk
/s/ Sam F. Adkins, Deputy

## APPENDIX E

[Excerpt of trial transcript, containing motion to strike evidence of damages and trial court's bench ruling thereon, drawn from Record filed in the Supreme Court of Ohio.]

THE COURT: Go ahead with your motion.

MR. BURKHART: First, Your Honor, since the cross-examination of Mr. Comer, I respectfully move to strike his testimony concerning damages.

The testimony that he gave concerning the break-even point is obviously highly speculative, not based upon any intelligent records that he has. The testimony that he has given is incredible. As a matter of fact, that is because he has changed his testimony from $6,500 to $7,000, and now he is back down to $6,000. It has not been supported by any reasonable records, and he has not been qualified as an expert in this respect.

Consequently, Your Honor, I submit that his testimony is incredible and unworthy of belief, and it should be inadmissible as to that feature.

Also, Your Honor, his testimony with respect to the diminution of value of stock, obviously he has no background to support that type of evaluation, and he has no basis for it in his testimony that he gave here. He just took those figures out of his head.

Aside from that, Your Honor, he just took a particular period of time, from July 21, 1972 through August 31, 1972 and he has given an appraisal of the value of the property on those two dates. Those are not proper measures of damages. He continued in the operation of the business. He wasn't willing to come in and show what his profits or losses were thereafter.

Consequently, Your Honor, that is absolutely not a proper measure of damages, and I will move to strike all that testimony.

* * * *

THE COURT: Well, first of all I will go to the question of value of the stock, and I permitted that testimony on the basis that this was a shareholder, a single shareholder, even though the lawsuit is brought on behalf of the corporation, a separate legal entity, and I permitted the testimony as to the value of the stock because he is the sole shareholder of the stock, so even though there are separate legal entities, for all intents and purposes Mr. Comer and the corporation are one and the same, so far as whatever the value of the thing is.

Now, I am going to strike his testimony as to that value and I am going to instruct the jury to disregard it. The values placed on the stock on those dates are not supported by any credible evidence that I have seen in this courtroom. Obviously, whatever that corporation owns, it owns certain personal equipment, and it had a lease hold agreement, and it had the value of the liquor license or whatever it is, but there was never any testimony as to what furnishings were included, no testimony as to the value of the lease hold, no testimony as to the value of any of the equipment which was purchased after the fact, the purchase agreement in 1973, and it would have been a liability of the corporation for the balance of the lease. There is simply no evidence to support the allegations of value.

Now, to get back to this break-even figure, it seems to me that that has been all up and down the ladder. There is one other thing on the question of diminution of value of the stock, even loss of business is not supported by the evidence in my estimation, and all the jury could do so far as that is concerned is to speculate on what damages, if any, were incurred, provided they found liability on the other questions involved in this lawsuit.

I find this break-even figure highly speculative, it balances between $6,500 and $7,000, and then on redirect examination he showed in a break-even figure of 15 percent. A break-even figure to me means at some point your sales are sufficient to cover your expenses, whatever they are. I don't know how, from the evidence that we have, they could arrive at a break-

even figure. He explains that in September of 1971 it was $7,000, and for August it would vary, and he didn't say how it would vary or what would affect the variance, so I don't know how we can arrive at any average for that period of time, or for anything pertinent to damages by way of these figures.

I think that the only reasonable conclusion that the jury could reach from the testimony would be that it was $7,000 in September of 1971, and heaven knows where it was in between. Again, I think we are back to speculation.

I will grant both of your motions, Mr. Burkhart. You may have an exception to the Court's ruling, Mr. Atkins.

## APPENDIX F

[Excerpt of trial transcript, containing motion for directed verdict and trial court's bench ruling thereon, drawn from Record filed in the Supreme Court of Ohio.]

MR. BURKHART: I have one further thing. The defendant respectfully moves the Court for a directed verdict in this case on the following grounds: The first ground is that there is absolutely no libel in the statements that were published by the defendant. There is no claim in any of those statements that the plaintiff was in any way involved in gambling activities. They have referred to gambling activities by others on those premises.

The second basis is that the statements were accurate and they were true, which is a legal defense.

The third basis is that the broadcasts were a fair synopsis of information furnished from governmental sources such as the police department, and also the warrant which is part of the Court's record, and those publications by the defendant were presented in absence of malice, and it is obvious from the testimony in the plaintiff's case that they were fair synopses of police information and the information taken from those records that are before the Court. There was absolutely no evidence in this case of malice, and there has been no claim of malice in the amended pleadings.

All of the evidence clearly demonstrates that the reports were accurately sufficient to meet the requirement of law.

The fourth point, there can be no actual malice, there can be no liability in the absence of actual malice in so far as this case is concerned. I am aware of the Maloney case but Maloney would not have application here, because the two statutes which permit publication of fair synopses unless there is malice, so even in view of Maloney, because of those two statutes, they still are required to show malice in this case, Your Honor, and there has been no evidence of that malice.

Aside from the absence of malice, the Court is not bound by the Maloney decision. I believe we have provided the Court with citations which indicate that there are other views concerning this in states other than Ohio, and we are in hopes that this Court can be prevailed upon to conclude that the decision in the Cuyahoga County case is incorrect and will make a different ruling so that the matter can be eventually taken to the Supreme Court for final determination to be made as to what the actual law is, in the event that we get that far.

Now, the reason that we claim that there was no malice, no libel published, is because there was no claim that the defendant conducted any gambling act.

I won't belabor the point, the Court has the citation of a Pennsylvania case in the brief that has been submitted, and that involved the allegation that slot machines were on the premises, and no claim was made that the plaintiff in that case was involved in slot machine activities, and the Court said that there was a fair and accurate representation from the standpoint of a synopsis of that information applied by governmental sources in that case, and the plaintiff was tried and was acquitted of having gambling devices, and the reported publication was found not to be libelous.

The Court's attention is invited to ORC 2317.04, which permits publication of synopses of police reports and court reports.

I can only add, Your Honor, that there is absolutely no proof in this case of any damages, and we respectfully request a directed verdict in behalf of the defendant.

* * * *

MR. BURKHART: Just one comment, Your Honor. When he speaks of lack of verification, even if no effort had been made to verify it, and it turns out the statements were accurate, we have before us here the search warrant, which indicates that the Scripps-Howard Company did have accurate information and published an accurate report.

In addition to that, we have a concession by Mr. Comer in this case that these materials were picked up, and those were the same materials that were identified in the broadcast, so even if there is no verification attempt, it would be of no moment, because everything that was stated by Mr. Schottelkotte was 100 percent accurate.

I see no point in talking about exemplary damages. I have given the Court a case brief, which I am sure you have had an opportunity to examine.

I respectfully submit, Your Honor, that there is no evidence here that would afford any basis for recovery of compensatory damages, and for that reason we believe that the motion is well taken.

THE COURT: Well, it will be the ruling of the Court that the plaintiff has failed to make out a case.

The Court would grant your motion for a directed verdict.

# APPENDIX G

COUNTY OF HAMILTON
COURT OF COMMON PLEAS
CINCINNATI, OHIO 45202

---

**October 10, 1979**

Charles G. Atkins, Esq.
Attorney at Law
1800 First National Bank Bldg.
105 E. 4th St.
Cincinnati, OH 45202

Harry M. Hoffheimer, Esq.
Attorney at Law
900 Tri-State Building
432 Walnut St.
Cincinnati, OH 45202

Re: Embers Supper Club, Inc. v.
Scripps Howard Broadcasting Co.
Case No. A-726032

Gentlemen:

The Court now rules upon the defendant's third motion for summary judgment filed January 10, 1977, which addresses itself to the plaintiff's second amended complaint filed August 4, 1976.

In deciding this matter the Court has before it an unverified second amended complaint, an unverified answer to the second amended complaint, memoranda of both parties on the various motions for summary judgment filed by the defendant, an affidavit of Jefferson Hermann, an affidavit of Daniel S. Comer, an affidavit of Albert Schottelkotte, answers to interrogatories propounded to plaintiff filed September 4, 1974, and signed by Daniel S. Comer, deposition of James F. Lumanick, and deposition of Albert J. Schottelkotte.

On the state of the record the Court finds there are disputed issues of fact concerning the issue of negligence and of damages which cannot be resolved on a motion for summary judgment. Therefore, the defendants third motion for summary judgment is denied.

This matter will be set on the Court's calendar for a status report on October 31, 1979, at 9:00 A.M., at which time an entry may be presented.

Sincerely,

Robert S. Kraft,
Judge